Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October term, 1996

RACHEL C. NELMIDA,
Petitioner,
v.

SHELLY EUROCARS, INC. dba BMW of Honolulu, Ltd., Hawaii Corporation; SHELLY AUTOMOTIVE MANAGEMENT, INC., dba Shelly Motors, Inc., a Hawaii Corporation; CHARLES GATES,in his capacity as a service manager and a supervisor at SHELLY EUROCARS, INC.; SCOTT DEMPSEY,in his capacity as a service writer at SHELLY EUROCARS, INC.

Respondents

Petition for Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTION PRESENTED

Does the ninety-day period in which to file a civil action under 42 U.S.C.Section 2000e-5(f)(1) commence when there is an initial attempted but unsuccessful certified mail delivery of a notice of the right-to-sue at designated address of the person aggrieved.

PARTIES TO THIS PROCEEDING

Petitioner is Rachel Nelmida. Respondents are Shelly Eurocars, Inc. dba BMW of Honolulu, Ltd., a Hawaii Corporation, Shelly Motors, Inc., a Hawaii Corporation; Charles Gates individually and in his capacity as a service manager and a supervisor at Shelly Eurocars, Inc.,; Charles Miller, individually and in his capacity as a Dispatcher at Shelly Eurocars, Inc..; Scott Dempsey, individually and in his capacity as a Service Writer at Shelly Eurocars, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rachel Nelmida respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed on April 29, 1997 in order to resolve an issue on which there is conflicting circuit authority concerning when the 90-day period of time to file a civil action commences as provided under 42 U.S.C. Section 2000e-5(f)(1).

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 112 F.3d 386 (9th Cir. 1997) and in Appendix "A." The findings of fact issued by the United States District Court for the District of Hawaii is reported in Appendix "B."

JURISDICTION

On July 6, 1994, Petitioner Rachel Nelmida filed a civil action in Hawaii state court, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq., and state law. The Respondents timely removed the action to federal court under 28 U.S.C. Section 1441 and the court's

jurisdiction was invoked under 42 U.S.C. Section 2000e-5 and filed a motion for summary judgment on the Title VII claims on the ground that the Title VII claim was not timely filed within the 90-day period after Petitioner had been given notice of her right to file a civil action by the United States Equal Employment Opportunity Commission ("EEOC"). On June 8, 1995, the court granted the motion and remanded the state claims back to state court. The order was entered on June 15, 1995. Petitioner filed her Notice of Appeal on July 14, 1995. The jurisdiction of the appeals court was invoked under 28 U.S.C. Section 1291. The United States Court of Appeals made a limited remand to the district court to complete its findings of fact and conclusions of law. On March 18, 1997, the district court issued its findings of fact. On April 29, 1997, the court of appeals filed its opinion affirming dismissal of the Title VII claims. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1)

STATUTORY PROVISION INVOLVED

42 U.S.C. Section 2000e-5(f)(1) provides in relevant part that:

If a charge filed with the Commission pursuant to subsection(b) is

dismissed by the Commission, ... the Commission has not file a civil action under this section ... or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission ... shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved.

STATEMENT OF THE CASE

On October 15, 1993, Petitioner Nelmida filed a charge of race and sex discrimination against the Respondents with the EEOC, after she resigned her job with Respondents on January 20, 1993. On March 11, 1994, the EEOC investigator informed Petitioner that the investigation was complete and invited her to send more documentation and evidence as appropriate to her charges. The notification also informed Petitioner that a "right-to-sue" letter would be sent by certified mail.

On March 18, 1994, the EEOC sent the right-to-sue notice to Petitioner by certified mail to the only address designated by the Petitioner to EEOC. A notice was left at the designated address indicating an attempted delivery and when the

letter would be available at the post office for pick up. Since the letter was not claimed by Petitioner or anyone else, the letter was returned to EEOC unopened as unclaimed mail with the notations "3/19," "Mar 25, 1994," and "Apr 03 1994."

On April 6, 1994, Petitioner contacted EEOC stating that she had not received the right-to-sue notice. Thereupon, on April 8, 1994, Petitioner received a copy of the right-to-sue notice from EEOC.
On July 6, 1994 Petitioner filed her Title VII complaint in Hawaii state court ninety days after receiving the second notice, but 110 days after the initial right-to-sue letter was mailed by EEOC.

REASONS FOR GRANTING THE WRIT

The opinion of the United States Court of Appeals for the Ninth Circuit concluded:

We hold that the ninety-day period in which to file suit began running when ***delivery*** of the right-to-sue was ***attempted*** at the address of record with the EEOC and that Nelmida's Title VII action is therefore time-barred. *Appendix* "A" at 4776 (Emphasis added)

Certiorari is appropriate because this opinion together with the opinion of the Fourth Circuit in Watts-Means v. Prince George's Family Crisis Center, 7 F.3d 40, 42 (4th Cir. 1993) are in conflict with other circuit authorties which hold that the 90-day period commences upon actual (and not attempted) delivery of the right-to-sue notice at the designated address of the complainant. Hornsby v. U.S. Postal Service, 787 F.2d 87, 91 (3rd Cir. 1986); Espinoza v. Mo. Pacific R & R Co., 754 F.2d 1247-49 (5th Cir. 1985); St Louis v. Alverno College, 744 F.2d 1314, 1317 (7th Cir. 1984); Hill v. John Cheznik Imports, 869 F.2d 1122, 1124 (8th Cir. 1989). While the foregoing authorities are less than coherent in their conclusions, the Ninth Circuit has now adopted a standard which is most at variance with the other circuits regarding when the Section 2000e-5(f)(1) filing period commences.

To the extent that the initial right-to-sue notice was attempted (but not actually delivered) to the appropriate address, and returned to EEOC when not claimed did not provide Petitioner adequate or proper notice of the right to bring a civil action within the meaning of Section 2000e-5(f)(1)

If ordinary first class delivery was made in addition to a certified mail delivery mode, then proper notice would have been effected and the "presumptive receipt" of the notice after a delivery period of five days would have commenced the 90-day filing period thereby depriving the complainant of any opportunity to extend the filing period. Hunter v. Stephenson, 790 F.2d 470, 474 (6th Cir. 1986); Ellison v. Northwest Airlines, Inc., 938 F.Supp. 1503, 1509 (D. Hawaii 1996). In summary, the initial attempted delivery notice left by the Postal Service at Petitioner's address provided notice that a certified mail delivery had been attempted and not that Section 2000e-5(f)(1) notification had been provided.

Under Section 2000e-16(c), the 90-day period to bring a civil action by federal employees for Title VII violations commences after "receipt" of notification of final agency action. Pari materia interpretation of the commencement of the 90-day period set forth in Section 2000e-5(f)(1) is clarified by Section 2000e-16(c) so as to impose internal statutory consistency of Title VII notification requirements.

CONCLUSION

For the reasons cited above, a writ of certiorari to the United States Court of Appeals for the ninth Circuit should issue.

Dated: Honolulu, Hawaii JUN 23 1997

William Tagupa,
Attorney for Pettioner
Rachel Nelmida

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RACHAEL C. NELMIDA,
Plaintiff-Appellant,

v.

SHELLY EUROCARS, INC., a Hawaii Corporation, dba BMW of Honolulu, Ltd.; SHELLY AUTOMOTIVE MANAGEMENT, INC., a Hawaii corporation, dba Shelly Motors, Inc.; CHARLES GATES, individually and in his capacity as a Service Manager and Supervisor at Shelly Eurocars, Inc.; CHARLES MILLER, individually and in his capacity as a Dispatcher at Shelly Eurocars, Inc.; SCOTT DEMPSEY, individually and in his capacity as Service Writer at Shelly Eurocars, Inc.; JOHN DOES 1-10; JANE DOES 1-10; DOE BUSINESS ENTITIES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; DOE UNINCORPORATED ORGANIZATIONS 1-10; DOE GOVERNMENTAL AGENCIES 1-10,
Defendants-Appellees.

SUPREME CO
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State of Hawaii

No. 95-16334
D.C. No.
CV-94-00594-DAE
OPINION

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Submitted December 11, 1996*
Submission Deferred February 3, 1997
Re-Submitted March 21, 1997
San Francisco, California

Filed April 29, 1997

Before: Betty B. Fletcher, Charles Wiggins, and Thomas G. Nelson, Circuit Judges.

Opinion by Judge Nelson

SUMMARY

Labor and Employment/Employment Discrimination

The court of appeals affirmed a judgment of the district court. The court held that in an action for employment discrimination under Title VII of the Civil Rights Act of 1964, the 90-day period within which to file the action begins when the postal service attempts delivery of a right-to-sue notice from the Equal Employment Opportunity Commission (EEOC) at the employee's address of record.

In October 1993, appellant Rachael Nelmida filed a charge of race and sex discrimination against appellee Shelly Eurocars, Inc. with the EEOC. The EEOC sent Nelmida a predetermination letter stating that a right-to-sue notice would be sent to her by certified mail, and that it was her responsibility to claim it. Nelmida's address of record with the EEOC was the Moanalua Road residence of her parents and three siblings.

*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a) and Ninth Circuit Rule 34-4.

On March 18, 1994, the EEOC sent a right-to-sue letter to Nelmida at the Moanalua address. However, Nelmida was not residing there: from March 1993 to December 1994, she lived in an apartment in Kalihi. During that period she spoke to her parents about once a month. They did not have the Kalihi address, and it was uncertain whether they had the phone number. Nelmida had not informed the EEOC that she was no longer residing at the Moanalua address, and did not give them the Kalihi address or phone number.

In mid-March, Nelmida had left Hawaii for about a month, but did not notify the EEOC. After she returned on March 31, Nelmida went to her parents' home, but did not inquire about her mail. A few days later, her sister told Nelmida that she had received some mail, but they were unable to find it in their parents' house. Nelmida reviewed the predetermination letter and realized that the right-to-sue notice was the lost piece of mail. She telephoned the EEOC on April 6, saying that she had not received the right-to-sue notice. The EEOC mailed Nelmida a copy of the notice, which she received on April 11.

On July 6, 90 days after she received the copy of the right-to-sue notice, but 110 days after the original was mailed by the EEOC, Nelmida filed an action against Shelly in Hawaii state court.

Shelly removed the action to federal court. On Shelly's motion for summary judgment, the district court ruled that Nelmida's suit was time-barred because it was not filed within the 90-day limitation period for Title VII claims. The court remanded the remaining state-law claims to state court. Nelmida appealed.

[1] Before a claimant can file a Title VII civil action, she must file a timely charge of discrimination with the EEOC. If the EEOC dismisses the charge, the claimant has 90 days to

file a civil action. If the claimant fails to file the action within the 90-day period, the action is barred.

[2] Nelmida did not file suit until July 6, 1994, more than 100 days after delivery of the original right-to-sue notice was attempted at the address of record with the EEOC. The 90-day period within which to file suit began when delivery of the right-to-sue notice was attempted at the address of record. Nelmida's Title VII action was therefore time-barred.

[3] The 90-day period within which to file a civil action after dismissal of the charge by the EEOC is a statute of limitations subject to the doctrine of equitable tolling. However, equitable tolling is to be applied only sparingly. Courts have generally been unforgiving when a late filing is due to the claimant's failure to exercise due diligence in preserving her legal rights.

[4] Equitable tolling was inapplicable to Nelmida's case. It could not be said that Nelmida was diligent in ensuring that she would receive the right-to-sue notice. Nelmida gave the EEOC the Moanalua address despite the facts that she did not reside there and often did not receive mail sent there. Nelmida left Hawaii for several weeks and failed to inform the EEOC of her absence. [5] She had actual notice on April 6, 1994 that the EEOC had mailed the right-to-sue letter on March 18. [6] Nelmida did not provide any explanation or reason why she waited until July 6 to file her complaint.

COUNSEL

Elizabeth Jubin Fujiwara and Cara Mei Kam Ching, Honolulu, Hawaii, for the plaintiff-appellant.

Richard M. Rand, Torkildson, Katz, Jossem, Fonseca, Jaffe, Moore & Hetherington, Honolulu, Hawaii, for the defendants-appellees.

OPINION

T.G. NELSON, Circuit Judge:

OVERVIEW

Rachael C. Nelmida brought suit in Hawaii state court against defendants Shelly Eurocars, Inc., dba BMW of Honolulu, Ltd.; Charles Gates; Charles Miller; and Scott Dempsey alleging violations of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §§ 2000e *et seq.*, as well as violations of state law. The defendants removed the case to federal district court, then filed a motion for summary judgment on the Title VII claims. The district court granted summary judgment on the Title VII claims and remanded the remaining claims to state court. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We affirm.

FACTS AND PROCEDURAL HISTORY

On January 20, 1993, Nelmida resigned her position at BMW of Honolulu. Approximately nine months later, on October 15, 1993, Nelmida filed a charge of race and sex discrimination against defendants with the Equal Employment Opportunity Commission ("EEOC"). On March 11, 1994, after completing an investigation into Nelmida's charges, the EEOC's investigator sent a pre-determination letter to Nelmida informing her that their investigation was complete and inviting her to provide further documentation and evidence supporting her charge of discrimination, if in fact there was such evidence, within ten days. The letter also informed Nelmida that a determination letter ("right-to-sue notice") would be sent to her by certified mail[1] and that it was her responsibility to claim that letter.

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[1]When a letter is sent via certified mail, return receipt requested, the recipient must sign a receipt acknowledging delivery. If the recipient is not at home, a notice will be left indicating that the post office attempted

On March 18, 1994, the EEOC sent a right-to-sue notice to Nelmida, by certified mail, to 99-055 Moanalua Road, Aiea, Hawaii 96701, the address given by Nelmida at the time she filed the charges with the EEOC. The Moanalua address was the address of her parents, her two sisters and her brother.

Nelmida was not living at the Moanalua address in March 1994. Instead, from around March 1993 to December 1994, Nelmida lived at a friend's apartment in Kalihi. During this period, Nelmida spoke to her parents about once a month. They did not have the Kalihi address and Nelmida does not remember whether they had her phone number. Although Nelmida did receive mail at the Kalihi address, her bills were going to the Moanalua address. Nelmida admits that she often does not receive mail sent to her at the Moanalua address because it gets lost or because no one tells her about it. Nelmida also admits that her family occasionally lies to her about whether mail has been received at the Moanalua address, and that she decided to have communications with her attorney sent to the Kalihi address rather than the Moanalua address because she wanted to make sure she got it. Nelmida did not inform the EEOC that she was no longer living at the Moanalua address, nor did she give them the Kalihi phone number or address.

On approximately March 15, 1994, Nelmida left Hawaii to help her cousin move to Las Vegas. She told her parents that she was going to Las Vegas and that she would return in about one month. She told her parents that she would be in the California Hotel for four days and then in her cousin's apart-

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delivery and indicating when the letter is available at the post office for pick up. The recipient also has the option of requesting a redelivery. If after five days the recipient does not pick up the letter, the post office leaves a second notice which indicates that there are ten days remaining to pick up the letter or to request redelivery. After this ten-day period, if the letter is still unclaimed, the post office returns the letter to the sender as unclaimed.

ment. She also told the family members living at the Moanalua address to look out for mail addressed to her. Nelmida did not inform the EEOC that she would be leaving the island for approximately a month.

Nelmida returned to Hawaii on March 31, 1994. She went to her parents' home on April 1, 1994, but did not ask about any mail or messages for her. A few days later when she returned to her parents' home, her sister Elissa told her that she had received some mail. Nelmida and her sister searched the house, but could not find the mail. Nelmida believed that the lost mail was the right-to-sue notice.

Thereafter, Nelmida found the pre-determination letter, dated March 11, 1994, which summarized the evidence collected by the EEOC investigation and invited Nelmida to submit any further arguments, explanations or supporting evidence within ten days of the date of the letter.

Realizing from the pre-determination letter that the EEOC had dismissed her charges, and believing that the right-to-sue notice was the lost piece of mail, Nelmida telephoned the local EEOC office on April 6, 1994. Nelmida told the EEOC office that she had not received the right-to-sue notice. The EEOC confirmed the Moanalua address with Nelmida and mailed a copy of the right-to-sue notice to Nelmida on April 7, 1994. Nelmida received the copy of the notice on April 8, 1994.

The envelope containing the original right-to-sue notice mailed to Nelmida on March 18, 1994, has three dates written upon it: "3/19" in handwriting; "Mar 25 1994" stamped; and "Apr 03 1994" stamped with RTN handwritten next to the date. This envelope was returned to the EEOC unopened, as unclaimed mail, on April 11, 1994.[2]

[2]This court remanded this case to the district court to permit the parties to more fully develop the record concerning the attempted delivery of the right-to-sue notice. Much of the foregoing statement of facts is based on the district court's uncontested findings on remand.

On July 6, 1994, ninety days after she received the copy of the right-to-sue notice, but approximately one hundred ten days after the original right-to-sue notice was mailed to her by the EEOC, Nelmida filed a complaint in Hawaii state court. The complaint alleges violations of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §§ 2000e *et seq.*, as well as violations of state law, by both the individual defendants and BMW. The defendants removed the case to federal district court, then filed a motion for summary judgment on the Title VII claims. The district court granted the summary judgment motion, holding that Nelmida failed to comply with the ninety-day limitation period within which to file a Title VII civil action. Because all federal claims were resolved, the district court remanded the remaining state law claims to Hawaii state court. Nelmida timely appeals.

STANDARD OF REVIEW

We review a grant of summary judgment *de novo*. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* The court must not weigh the evidence or determine the truth of the matter, but only determine whether there is a genuine issue for trial. *Id.* at 1131.

DISCUSSION

A. Timely Filing of Civil Action

[1] Before a claimant can file a Title VII civil action, she must file a timely charge of discrimination with the EEOC. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). If the EEOC dismisses the charge, a claimant has ninety days to file a civil action. 42 U.S.C. § 2000e-5(f)(1). This ninety-day period is a statute of limitations. *Scholar v.*

Pacific Bell, 963 F.2d 264, 266-67 (9th Cir.1992). Therefore, if a claimant fails to file the civil action within the ninety-day period, the action is barred. *Id.* at 267.

Neither this circuit, nor any other circuit, has determined when the ninety-day period begins to run under the fact scenario in the present case. However, a review of the precedent in this circuit, as well as cases from the other circuits, is informative.

In *Scholar v. Pacific Bell*, 963 F.2d 264, 267 (9th Cir. 1992), the EEOC right-to-sue notice, sent by certified mail to the claimant's place of residence, was received and signed for by the claimant's daughter on November 1, 1988. However, the claimant did not read the notice until a few days after it was delivered to her home. We held that the claimant's civil action, filed on February 2, 1989, was barred by the statute of limitations. *Id.* "The language of the statute establishes the 90-day period as running from the 'giving of such notice' rather than from the date claimant actually 'receives' notice in hand." *Id.* (citing 42 U.S.C. § 2000e-5(f)(1) and *Espinoza v. Missouri Pac. R.R. Co.*, 754 F.2d 1247, 1248-50 (5th Cir. 1985)). Notice was given when the right-to-sue notice was received and signed for by the claimant's daughter. *Id.* The civil suit was filed more than ninety days after the notice was given; therefore, we held that the civil action was time-barred. *Id.* at 268-72.

In *St. Louis v. Alverno College*, 744 F.2d 1314, 1315 (7th Cir. 1984), the claimant never received the right-to-sue notice. The notice was mailed to the address that claimant had given to the EEOC, but was returned to the EEOC because the claimant no longer lived at that address. He had moved from the address several years prior, but had not formally informed the EEOC of his change of address. *Id.* Approximately nine months after the notice was sent to the claimant, an attorney contacted the EEOC on behalf of the claimant and was informed that the right-to-sue notice had already been issued.

Copies of the notice were sent to the claimant, and the claimant filed a *pro se* complaint within ninety days of receiving the copies of the notice. *Id.*

The court held that the action was time-barred:

> If [the claimant] had notified the EEOC that he had moved or had taken reasonable steps to ensure that he would receive mail delivered to the [address given to the EEOC], his failure to receive the notice might come within the holding of [*Archie v. Chicago Truck Drivers Union*, 585 F.2d 210 (7th Cir. 1978), that the ninety-day period begins running on the date a claimant actually receives the right-to-sue notice]. But the basis for our decision there . . . was that claimants who do not receive actual knowledge of their right-to-sue letter through no fault of their own should not be penalized. In this case, however, [claimant's] failure to tell the EEOC that he had moved was not an event beyond his control. Accordingly, we hold that the ninety-day limit began running on the date the notice was delivered to the most recent address plaintiff provided the EEOC.

Id. at 1317 (citation omitted).

In *Banks v. Rockwell Int'l N. Am. Aircraft Operations*, 855 F.2d 324, 325 (6th Cir. 1988), the EEOC mailed the right-to-sue notice to the claimant on September 7, 1983, at the address the EEOC had on record. The post office returned the right-to-sue notice to the EEOC with the explanation that the claimant had moved and left no address. *Id.* Approximately four months later, claimant's counsel sent a letter to the EEOC requesting a right-to-sue notice. This letter failed to provide the EEOC with the claimant's current address.

Claimant's counsel sent another letter to the EEOC after he became aware that the EEOC had previously issued a right-to-

sue notice. The letter from counsel explained that the claimant had not been living at the address provided to the EEOC due to a divorce, and that the claimant's wife had not forwarded his mail. The letter also provided the EEOC with the claimant's then current address and requested that a right-to-sue notice be reissued to the claimant at that address. The EEOC reissued the right-to-sue notice on March 15, 1984, and the claimant filed a civil action in district court on June 7, 1984. The district court dismissed the action, finding it barred by the limitations period.

In upholding the dismissal, the Sixth Circuit stated that where a claimant has failed to notify the EEOC of a change of address, the ninety-day period begins running five days after the date on which the EEOC mailed the notice to the claimant's address of record. *Id.* at 326 (citing *Hunter v. Stephenson Roofing, Inc.*, 790 F.2d 472, 475 (6th Cir. 1986)). Because the EEOC had mailed the claimant's right-to-sue notice on September 7, 1983, the ninety-day period began to run five days later. The civil complaint, filed June 7, 1984, was not within the ninety-day statutory period and was therefore time-barred. *Id.* at 326-27.

In the present case, the right-to-sue notice was sent by certified mail on March 18, 1994, to the Moanalua address that Nelmida had given to the EEOC. The post office attempted delivery of the letter on March 19, 1994, at the Moanalua address, as indicated by the handwritten date "3/19" on the envelope. Because no one was at home to receive the letter, the post office left a notice that delivery had been attempted and that the letter was available at the post office for pick up. The post office left a second notice at the Moanalua address on March 25, 1994, indicating that there were ten days remaining to pick up the letter or to request redelivery. The letter remained at the post office, awaiting pick up, until April 3, 1994. Because Nelmida failed to pick the letter up, it was returned to the EEOC as unclaimed.

[2] Nelmida did not file suit until July 6, 1994, more than one hundred days after delivery of the original right-to-sue notice was attempted at the address of record with the EEOC. We hold that the ninety-day period within which to file suit began running when delivery of the right-to-sue notice was attempted at the address of record with the EEOC and that Nelmida's Title VII action is therefore time-barred. *See St. Louis*, 744 F.2d at 1317.

B. Equitable Tolling

[3] The ninety-day period within which to file a civil action after dismissal of the charge by the EEOC is a statute of limitations subject to the doctrine of equitable tolling. *Scholar*, 963 F.2d at 266-67. Equitable tolling is, however, to be applied only sparingly, *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990), and "[c]ourts have been generally unforgiving . . . when a late filing is due to claimant's failure 'to exercise due diligence in preserving his legal rights,' " *Scholar*, 963 F.2d at 268-72 (quoting *Irwin*, 498 U.S. at 96).

For example, in *Hunter*, 790 F.2d at 475, the Sixth Circuit held that when the claimant does not receive the right-to-sue notice promptly because of his failure to notify the EEOC of a change of address, he may not claim that the ninety-day time period is equitably tolled. In *Banks*, 855 F.2d at 327, the Sixth Circuit again held that the doctrine of equitable tolling was inapplicable where the claimant did not tell the EEOC of his change of address. The court noted: "[T]he tolling of limitations requested by [claimant] is grounded in equity. A cardinal maxim of equity jurisprudence is that he who comes into equity must come with clean hands. [Claimant] did not do so in the instant case where he failed to notify the EEOC of his change of address as required by the regulations." *Id.* (citation omitted).

Similarly, in *Hill v. John Chezik Imports*, 869 F.2d 1122 (8th Cir. 1989), the Eighth Circuit refused to equitably toll the

ninety-day period where the claimant had not informed the EEOC of a change of address. The EEOC had sent the right-to-sue letter to the address it had on record, but the claimant never received it because she had moved. The court held that the claimant received constructive notice when the right-to-sue letter was sent to her old address, and that equitable tolling was not appropriate because the claimant had failed to notify the EEOC of her new address. *Id.* at 1123-24. The court recognized that equitable tolling was generally reserved for circumstances which are truly beyond the control of the plaintiff, and that the case before it was not such a case:

> Hill could easily have informed the EEOC of her new address. The fact that Hill relied on the EEOC to send copies of correspondence to her attorney does not distinguish her case. *Moreover, when Hill actually learned in early October that the right to sue letter had already been sent, she still had ample time to file her suit.* The facts in this case do not compel the equitable tolling of the ninety-day limitation period.

Id. at 1124 (citation omitted) (emphasis added).

Finally, in *Harvey v. City of New Bern Police Dep't*, 813 F.2d 652, 654 (4th Cir. 1987), the Fourth Circuit held that equitable tolling will not be applied where the claimant did not file suit within ninety days of receipt of the right-to-sue letter. "[Claimant] knew of the right to sue letter within six days of its arrival and this left him eighty-four days to file his complaint. There has been no showing that this was not sufficient time within which to act." *Id.*

[4] We follow the lead of these cases and hold that the doctrine of equitable tolling is inapplicable to the present case. First, it cannot be said that Nelmida was diligent in insuring that she receive the right-to-sue notice from the EEOC. Nelmida gave the EEOC the Moanalua address despite the fact

that she did not reside there and despite her knowledge that she often did not receive mail sent to this address. Furthermore, Nelmida left Hawaii for several weeks and failed to inform the EEOC of her absence, despite her knowledge that the right-to-sue notice might arrive during her absence.

[5] Second, Nelmida had actual knowledge and notice, on April 6, 1994, that the EEOC had mailed the right-to-sue letter on March 18, 1994. The EEOC told her this, and gave her the information on how to proceed, when she called them after returning from the mainland.

[6] Finally, Nelmida has not provided any explanation or reason why she waited until July 6, 1994, to file her complaint. Nelmida had more than ten weeks after receiving the copy of the right-to-sue letter on April 8, 1994, to timely file a complaint. This is certainly sufficient time to commence an action, particularly where both she and her attorney were aware that the original letter had been issued on March 17, 1994, and mailed on March 18, 1994, and that there may therefore be an issue as to timeliness. *See Scholar*, 963 F.2d at 268-72 ("Even if we accept Ms. Scholar's statements as fact, she still had 76-83 days in which to preserve her legal rights; Ms. Scholar offers no explanation as to why this was not sufficient time in which to commence her action."). *See also Million v. Frank*, 47 F.3d 385, 389 (10th Cir. 1995) (equitable tolling inapplicable where there is no evidence that claimant had insufficient opportunity or time to file action once he actually saw the notice); *Ervin v. County of Los Angeles*, 848 F.2d 1018, 1019-20 (9th Cir. 1988) (where a claimant's delay in filing her civil action is unwarranted, the delay is neither reasonable nor in good faith, and therefore equitable tolling inapplicable).

CONCLUSION

The district court's grant of summary judgment in favor of defendants on the Title VII claims and the remand to state court of the other claims is affirmed.

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RACHEL C. NELMIDA, Plaintiff, v. SHELLY EUROCARS, INC. dba BMW of Honolulu, Ltd., Hawaii Corporation) SHELLY AUTOMOTIVE MANAGEMENT, INC., dba Shelly Motors, Inc., a Hawaii Corporation; CHARLES GATES, in his capacity as a service manager and a supervisor at SHELLY EUROCARS, INC.; SCOTT DEMPSEY, in his capacity as a service writer at SHELLY EUROCARS INC. Defendants.	CV. No. 94-00594 DAE

FINDINGS OF FACT

Pursuant to the Ninth Circuit Remand directing this court to make findings of fact regarding whether the Postal Service attempted delivery of the EEOC right-to-sue letter at the address provided by Plaintiff Rachel Nelmida to the EEOC and why the letter was returned to the EEOC instead of delivered to that address, and after receiving appropriate submissions by both parties, the court makes the following findings of fact:

1. The EEOC prepared and dated the Determination Letter/Right-to-Sue Letter ("Determination Letter") for Plaintiff Rachel Nelmida on March 17, 1994. Exh. A. Defendants' Brief; Exh. A. Plaintiff's Brief, Copy of Determination Letter.

2. On March 18, 1994, the EEOC mailed the Determination Letter to Plaintiff, Defendant's and Defendants' counsel. Exh. B, Plaintiff's Brief; Exh. C, Plaintiff's Brief, EEOC Log.

3. The Determination Letter was sent to Plaintiff via certified mail. Exh. D, Plaintiff's Brief; Exh. C, Defendants' Brief, Copy of Envelope.

4. When a letter is sent via certified mail, the recipient must

sign a receipt acknowledging delivery. if the recipient is not at home, a notice will be left indicating that the Post Office attempted delivery and indicating when the letter is available at the Post Office for pick-up. The recipient also has the option of requesting a redelivery. If after five days the recipient does not pick up the letter, the Post Office leavers a second notice which indicates that there are ten days remaining to pick up the letter or to request redelivery. After this ten-day period, if the letter is still unclaimed, then the Post Office returns the letter to the sender as unclaimed. Exh. E, Plaintiff's Brief; Exh. B, Defendant's Brief, Deposition of Bret Takahara, Station Manager at the Makiki Post Office.

5. The envelope which contained the Determination Letter mailed has three dates written upon it: "3/19" in handwriting' "Mar 25 1994" stamped; and "Apr 03 1994" stamped with RTN handwritten next to the date. Exh. D. Plaintiff's Brief, Copy of Envelope.

6. The EEOC mailed the Determination Letter to 99-055 Moanalua Rd., Aiea, Hawaii 96701. Exh. A. Plaintiff's Brief, Determination Letter.

7. The Moanalua address was the address given by Plaintiff at the time she filed the charges with the EEOC. Exh. F, Plaintiff's Brief, Deposition of Plaintiff at 51. This address was the address of her parents, her two sisters, and her brother Exh. C, Defendants' Brief, Deposition of Plaintiff at 20-21.

8. Plaintiff was not living at the Moanalua address in March 1994. Instead, from around March 1993 to December 1994, Plaintiff lived at a friend's apartment in Kalihi. Exh. C, Defendants' Brief, Deposition of Plaintiff at 17, 31.

9. During this period, Plaintiff spoke to her parents about once a month. Id. at 19-20. They did not remember if they had her phone number. Id. at 23.

10. During this period, Plaintiff was receiving mail at the kalihi address, but bills were going to the Moanalua address. Id. at 22, 23.

11. Plaintiff did not inform the EEOC that she was no longer living at the Moanalua address, nor did she give them the Kalihi phone number or address. Exh. F, Plaintiff's Brief, Deposition of Plaintiff at 51, 54.

12. There have been several occurrences where mail of Plaintiff's which was sent to the Moanalua address was lost, both before and after March 1994. Exh. F, Plaintiff's Brief, Deposition of Plaintiff at 126.

13. Plaintiff's family occasionally would lie to her about whether mail was received. Id.

14. The problem of not actually receiving her mail, and not being alerted that she had received mail, lasted from the time Plaintiff moved out of her parents' home (March 1993) until she moved back (December 1994). Id. at 127.

15. Approximately March 15, 1994, Plaintiff left Hawaii to help her cousin, Brenmelle Hagmoc, move to Las Vegas. Id. at 38-43. She told her parents she was going to Las Vegas and that she would return in about one month. Id. at 39-40. She told her parents that she would be in the California Hotel for four days and then in her cousin's apartment, however, she did not provide an address or phone number for the cousin's apartment. Id. at 40-41.

16. Plaintiff did not inform the EEOC that she would be leaving the island for approximately a

month. Id. at 83.

17. Plaintiff returned to Hawaii on March 31, 1994. Id. at 50.

18. Plaintiff went to her parent's house at the Moanalua address on April 1st. Id. at 55.

19. Plaintiff did not ask her parents if she had received any mail or messages. Id. at 57.

20. Before she left for Las Vegas, Plaintiff told the family members living at the Moanalua address to look out for mail addressed to her. Id. at 71.

21. When Plaintiff went to her parents' home on April 1st, no one told her she had received mail. Id. at 71.

22. When Plaintiff returned to her parents' home a few days later, her sister Elissa told her that had in fact received mail. Id. at 72.

23. Plaintiff and her sister searched the house, but could not find the mail. Id. at 72.

24. Plaintiff believed that this lost piece of mail was the Determination Letter, giving her the right to sue. Id. at 73.

month. Id. at 83.

17. Plaintiff returned to Hawaii on March 31, 1994. Id. at 50.

18. Plaintiff went to her parent's house at the Moanalua address on April 1st. Id. at 55.

19. Plaintiff did not ask her parents if she had received any mail or messages. Id. at 57.

20. Before she left for Las Vegas, Plaintiff told the family members living at the Moanalua address to look out for mail addressed to her. Id. at 71.

21. When Plaintiff went to her parents' home on April 1st, no one told her she had received mail. Id. at 71.

22. When Plaintiff returned to her parents' home a few days later, her sister Elissa told her that had in fact received mail. Id. at 72.

23. Plaintiff and her sister searched the house, but could not find the mail. Id. at 72.

24. Plaintiff believed that this lost piece of mail was the Determination Letter, giving her the right to sue. Id. at 73.

25. Plaintiff thereafter found the pre-determination letter, dated March 11, 1994, which summarized the evidence collected by the EEOC investigation and invited Plaintiff to submit any further arguments, explanations, or supporting evidence within ten days of the date of the letter. Exh. E, Defendants' Brief, Deposition of Plaintiff at 59; Exh. D, Defendants' Brief, pre-determination letter.

26. Realizing from the pre-determination letter that the EEOC had dismissed her charges, and believing that the Determination Letter was the lost piece of mail, Plaintiff then phoned the EEOC to request that another copy be sent. Exh. E, Defendants' Brief, Deposition of Plaintiff at 60-61; 24; Exh. F, Plaintiff's Brief, Deposition of Plaintiff at 73.

27. On April 6, 1994, Plaintiff called the EEOC and said that she had not received a copy of the Determination Letter. The EEOC confirmed the Moanalua address with Plaintiff, and mailed a second copy of the March 17, 1994 Determination Letter to Plaintiff on April 7, 1994 to the Moanalua address. Exh. B, Plaintiff's Brief, EEOC Log.

28. The Determination Letter

mailed on March 17, 1994, was returned to the EEOC unopened, as unclaimed mail, on April 11, 1994, Exh. C, Plaintiff's Brief, Declaration of Mark Stangle, EEOC investigator.

Factual Conclusions

1. The EEOC mailed the Determination Letter to the address given by Plaintiff.

2. Plaintiff did not notify the EEOC of the address of her actual residence.

3. When the EEOC mailed the Determination Letter, Plaintiff neither lived at the address given nor did she consistently check the mail at the address given.

4. The Post Office left two notices at the address given by Plaintiff stating that Plaintiff had received a certified letter. The first notice was left on March 19, 1994 and the second on March 25, 1994.

5. Plaintiff returned from Las Vegas on March 31, 1994.

6. Plaintiff's Determination Letter remained at the Post Office, awaiting pick up until April 3, 1994.

7. Plaintiff never picked up this letter.

8. Plaintiff had actual notice on April 6, 1994, that the Determination Letter had previously been issued when she spoke to the EEOC on the telephone and they informed her of that fact and agreed to send her a second copy.

9. Plaintiff filed suit on Wednesday, July 6, 1994, 91 days after receiving actual notice that the Determination Letter had previously
been issued and would be resent to her.

10. Plaintiff did not receive the first mailed Determination Letter because of her own culpable conduct in failing to notify the EEOC of the address at which she actually resided, in failing to make arrangements to ensure the receipt of her mail when she was aware that her family did not always notify the EEOC when she left the island to help her cousin move, in failing to exercise due diligence in monitoring the mail received at the Moanalua address and in failing to pick up the first letter from the Post Office in the three days between when she returned to Hawaii and when the letter was sent back to the EEOC.

IT IS SO FOUND

DATED: Honolulu, Hawaii, Mar 18 1997

(signed) DAVID ALAN EZRA
UNITED STATES DISTRICT JUDGE

Rachel C. Nelmida vs Shelly Eurocars Inc., et al, Civil No. 94-00594 DAE; FINDINGS OF FACT